**ANCHORAGE MALL SDN BHD**

**v.**

**IRAMA TEAM (M) SDN BHD & ANOR**

HIGH COURT MALAYA, MELAKA
AHMAD MAAROP JC
[CIVIL APPEAL NO: 22-70 OF 2000]
22 MARCH 2001

***CIVIL PROCEDURE:*** *Pleadings - Striking out - Application to strike out writ and statement of claim - Unconditional appearance filed by defendant - Whether defendant precluded from making application to strike out - Rules of the High Court 1980, O. 18 r. 19*

***CIVIL PROCEDURE:*** *Judicial precedent - Supreme Court - Whether decision by Supreme Court clear and unmistakable - Whether pronouncement merely obiter - Whether open for lower courts to refuse decision by higher courts - Whether decision from a higher court should be faithfully followed as a guide*

The defendant in this case under O. 18 r. 19 Rules of the High Court 1980 ('RHC') had filed a summons-in-chambers (encl. 9) to strike out the writ of summons and the statement of claim filed by the plaintiff. The intervener raised a preliminary objection and this raised a question of law for the consideration of the court: (1) whether the defendant who had in this case filed an unconditional appearance was precluded from making an application under O. 18 r. 19 RHC to strike out the writ and statement of claim by the plaintiff. To support the intervener's contention, the learned counsel for the intervener relied on the judgment of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors*

**Held:**

**[1]** The Supreme Court's decision in *Alor Janggus* is clear and unmistakable. It is not open for this court to disregard or refuse to follow the decision in *Alor Janggus* unless and until it is reversed by the Federal Court. Even if what was said by the Supreme Court in *Alor Janggus* on O. 18. r. 19 was merely *obiter* being a judicial pronouncement emanating from the highest court in this country then, it deserved the utmost respect and should be followed as a guide as faithfully as possible.

*[Intervener's preliminary objection allowed; defendant's application in encl. 9 dismissed with costs.]*

**Case(s) referred to:**
*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461* ***(foll)***
*Cassell & Co Ltd v. Broome & Anor [1972] AC 1027* ***(foll)***
*Cooperative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365* ***(foll)***
*Lim Seak Huat v. Malayan United Realty Sdn Bhd [1997] 5 CLJ 336* ***(refd)***
*Miliangos v. George Frank (Textiles) Ltd Same V. Same [1975] 2 WLR 555* ***(foll)***
*N Carrupaiya v. MBF Properties Service Sdn Bhd & Anor [2000] 4 CLJ 116* ***(refd)***
*Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat [1999] 2 CLJ 886* ***(refd)***
*PP v. Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276* ***(foll)***
*Schorsch Meier GMBH v. Hennin [1974] 3 WLR 832* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 19(1), O. 33 r. 2

*For the plaintiff - Surjen Singh; M/s SM Ideris & Co*
*For the defendant - M Nagarajah (Miss Vinodini); M/s Shook Lin & Bok*
*For the intervener - Prakash Menon (Steven Puung); M/s Isharidah, Ho Chong & Menon*

*[Appeal from High Court Malaya, Melaka, Civil Suit No. 22-70-2000]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Ahmad Maarop JC:**
The defendant had filed the summons in chambers (encl. 9) to strike out the writ of summons and the statement of claim filed by the plaintiff on the ground that the writ and the statement of claim did not disclose a reasonable cause of action and that it was an abuse of the process of the court under O. 18 r. 19 of the Rules of the High Court 1980 (RHC).

At the outset of the hearing of the application in encl. 9, learned counsel for the intervener raised a preliminary objection contending that the defendant was precluded from making the application because the defendant had filed an unconditional appearance.

The preliminary objection raised a question of law for the consideration of the court. The question was whether the defendant, who had in this case filed an unconditional appearance was precluded from making an application under O. 18 r. 19 to strike out the writ and statement of claim filed by the plaintiff.

To support his contention that the defendant was precluded from filing the application in encl. 9 as it had filed an unconditional appearance, learned counsel for the intervener relied on the judgment of the Supreme Court in

*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461. Learned counsel for the intervener submitted that the judgment in *Alor Janggus* on O. 18 r. 19 of the RHC was followed by the Johor Bharu High Court in *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 and *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat* [1999] 2 CLJ 886.

Learned counsel for the plaintiff supported the preliminary objection made by the intervener and adopted the submission made by learned counsel for the intervener.

Learned counsel for the defendant on the other hand, contended in substance, that from the language employed by the provisions under O. 18 r. 19 of the RHC, it was clear that an application to strike out a statement of claim could be made at any stage of the proceeding. The entry of an unconditional appearance did not therefore preclude the defendant from making the application to strike out the writ and statement of claim filed by the plaintiff. Learned counsel for the defendant urged the court to follow the decision of Kuala Lumpur High Court in *N Carrupaiya v. MBf Properties Service Sdn Bhd & Anor* [2000] 4 CLJ 116. He submitted that *N. Carrupaiya* was the only case in which the learned judge had analysed the case of *Alor Janggus* before arriving at his decision in declining to follow the judgment in that case. Learned counsel submitted that it was open to this court to follow the decision in *N. Carrupaiya* instead of *Pet Far Eastern*.

The defendant also submitted that the speech of Jemuri Serjan CJ in *Alor Janggus* upon which the intervener's preliminary objection was based, was not binding and the principle of *stare decisis* was not applicable in this instance.

Further it was the defendant's submission that the statement of the Supreme Court in respect of O. 18 r. 19 of the RHC in its judgment in *Alor Janggus* was plainly and to all intent and purposes not *ratio decidendi* or rule of law which was laid down as one of the grounds of its judgment. In fact it was the defendant's submission that the statement in *Alor Janggus* which reads "It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 ..." which was relied upon by the intervener to support its preliminary objection, was made without the Supreme Court's attention having been drawn to the relevant authority, wherefore it was made *per incuriam* or through want of care and consequently not a binding precedent.

Learned counsel for the intervener in reply, submitted that it was not the question of choosing between conflicting decisions of two High Courts. He contended that this court was bound by the Supreme Court decision in *Alor Janggus*. Further it was contended by learned counsel for the intervener that even if *Alor Janggus* was decided *per incuriam*, the courts in the lower hierarchy of the judicial system in this country were bound by the decision in *Alor Janggus*. In support learned counsel for the intervener cited the case of *Cooperative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365.

In *Cooperative Central Bank Ltd v. Feyen* it was held by the Federal Court that it was necessary for each lower tier to accept loyally the decision of the higher tier and chaotic consequences would follow should the lower tier fail in this duty. It was therefore not open to an intermediate court of appeal, such as the court of appeal in this country, to disregard a judgement of a final court of appeal such as the Federal Court on the ground that it was given *per incuriam*. In that case the Federal Court, said (at p. 372):

> The question therefore arises: is it open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given *per incuriam*?

Our task in answering this question has been made considerably easier by the assistance derived from the remarks of Lord Hailsham in *Cassell & Co Ltd v. Broome & Anor* [1972] AC 1027, which indicated the reaction of the House of Lords to the Court of Appeal's refusal to follow a previous decision of the House on the ground that it had been given *per incuriam*.

Touching on the repercussions of the Court of Appeal advising judges of first instance to ignore decision of the House of Lords, Lord Hailsham said this (at p 1054B-D):

> I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided *'per incuriam'* or 'unworkable', they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is not guarantee that Lord Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of

the House of Lords and in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

And in a famous passage (at p. 1054D-E), Lord Hailsham concluded this part of the case by saying:

*The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v. Bristol Aeroplane Co Ltd [1944] 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.*

*In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty apply with full force, mutatis mutandis, to this country and we adopt what his Lordship said.* (Emphasis added).

In the case of *Cassell & Co Ltd v. Broome & Anor* [1972] 1 All ER 801 at p. 874, Lord Diplock said:

*My Lords, there is little that I should wish to add to what Lord Hailsham LC and Lord Reid have already said about the way the instant case was treated in the Court of Appeal. It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal I sometimes thought the House of Lords was wrong in overruling me. Ever since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.*

*The Court of Appeal found themselves able to disregard the decision of this House in Rookes v. Barnard by applying to it the label per incuriam. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal. Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferior to it the label per incuriam would have been misused.* (Emphasis added).

In *Miliangos v. George Frank (Textiles) Ltd Same V. Same* [1975] 2 WLR 555, by written contracts made in 1971 a swiss seller agreed to supply English buyers with goods at a price expressed in swiss francs payable to swiss bank within 30 days of date of invoice. The goods and invoices were delivered but the price was not paid; and bills of exchange drawn in Switzerland and accepted by the buyers were dishonoured on the due dates. In 1972 the seller commenced two actions in England claiming the sums due in Swiss francs converted to sterling at the breach date. The English buyers pleaded that the goods were defective and counter claimed for damages, but on 22 November 1974, a few days before the trial, they abandoned their defence and stated that they would submit to judgment. On 26 November 1974 the Court of Appeal in *Schorsch Meier GMBH v. Hennin* [1974] 3 WLR 832, held unanimously, that the rule that the English courts could express their money judgments in sterling only did not apply to money claims by nationals of one member state of the European Economic Community against those of another member state, by reason of art. 106 of the Treaty of Rome, which was made part of United Kingdom Law by the European Communities Act 1972. The Court of Appeal also held by majority, that the rule should also be discarded and judgment given in the currencies of other than E.E.C. countries where the foreign currency was the currency of the contract and the money of payment. The swiss seller amended his pleading to ask for judgment in Swiss Francs as an alternative to claiming judgment in sterling. Bristow J gave judgment for the moneys due expressed in sterling. The learned judge held that since the rule of English law, taken for granted by the House of Lords and the Court of Appeal for some 350 years, that the English Courts could express their judgment only in sterling had not been altered either by Parliament or the House of Lords, he was bound to apply it in giving judgment on a claim in the currency of a state which was not a member of the E.E.C. The learned judge also held that the majority conclusion of the Court of Appeal on that ground was given *per incuriam*. The swiss seller's appeal to the Court of Appeal was allowed.

In his judgment Lord Denning MR said at p. 564:

> The judge thought that the *Schorsch Meier* case was not binding on him. If that be so, it is certainly not binding on us. But why was it not binding on him? He was constrained, he said, by the judgment of the House of Lords in *Broome v. Cassell & Co Ltd* [1972] AC 1027. In that case Lord Hailsham of St. Marylebone LC, at p. 1053-54, thought that this court had greatly erred. It had flouted the decision of the House of Lords in *Rookes v. Barnard* [1964] AC 1129. He administered to us a severe rebuke. In the present case the judge must have thought that in the *Schorsch Meier* case we had fallen into the same error again; and that we had flouted a rule which had been taken for granted

> for 380 years and accepted by the House of Lords in the *Havana* case [1961] AC 1007. Nothing was further from our intention. It was not our intention in *Broome v. Cassell;* nor was it in *Schorsch Meier*. In our system it is of the first importance that the decisions of the House of Lords should be loyally followed and applied by this court and all courts in all cases which they properly govern. In the *Schorsch Meier* case the majority thought that the *Havana* case did not govern the point: and that it was open to the courts to give judgment in foreign currency. Whether the majority were right in so holding, I would not presume to say. The House of Lords will tell us later. *But whether right or wrong, it seems to me that once this court has given a decision upon it all lower courts should follow the decision of this court unless and until it is reversed by the House of Lords. In that way any embarrassment will be avoided. In the present case, therefore, the judge ought not to have refused to follow the decision in Schorsch Meier. He should have followed it and left the aggrieved party to appeal.* (Emphasis added).

The speech of Lord Hailsham, quoted by the Federal Court in *Cooperative Central Bank Ltd v. Feyen* and the statement of Lord Denning MR in *Miliangos v. George Frank (Textiles) Ltd* as highlighted above had also been referred to earlier by the Federal Court in the case of *PP v. Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276. In that case Chang Min Tat FJ delivering the judgment of the Federal Court said at p. 278:

> In *Miliangos v. George Frank (Textiles) Ltd.*, Lord Denning MR at p. 564 F6-G3 said in respect of the effect of a judgment of the Court of Appeal on the High Court that:
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> > ... whether right or wrong, it seems to me that once this court has given a decision upon it all lower courts should follow the decision of this court unless and until it is reversed by the House of Lords. In that way any embarrassment will be avoided.

Lord Gardiner LC in a practice statement on judicial precedent, [1966] 1 WLR 1234; [1966] 2 MLJ xi, on behalf of himself and the Lords of Appeal in Ordinary, while modifying the then practice to reserve the right to depart from a former decision of the House of Lords when it appeared right to do so, nevertheless began by restating that:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules.

That this restates the binding effect of a judicial decision on courts below it is clear from *Cassell & Co Ltd v. Broome & Anor* where Lord Hailsham of St Marylebone LC said at p. 653, E5-F6:

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.
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> *Clearly the principle of stare decisis requires more than lip-service*. (Emphasis added).

The decision in *Alor Janggus* on the applicability of O. 18 r. 19 of the RHC was followed by Abdul Malek Ishak J in *Lim Seak Huat v. Malayan United Realty Sdn. Bhd.* [1997] 5 CLJ 336 and *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886. In *Pet Far Eastern*, the learned judge held that since the second defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence, the second defendant would, per se, be precluded from invoking the operation of O. 18 r. 19(1) of the RHC. At p. 916, the learned judge said:

> I have in *Lim Seak Huat v. Malayan United Realty Sdn. Bhd (supra)* applied the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 and I proceeded to say as follows:
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> > There is one other matter that should be addressed. It is this. The defendant filed their unconditional appearance on May 8, 1995 as reflected at encl. 4. The summons-in-chambers for striking out in encl. 11 was dated June 23, 1995 and it was filed on the same date. Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC, speaking for the then Supreme Court had occasion to remark on filing an unconditional appearance in relation an Order 18 r. 19 of the RHC's application. This was what his Lordship said:
> >
> > > It is too late now for the defendants to invoke Order 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18 r. 19 but it is still open to them to have recourse to Order 33 r. 2 if they are so minded.
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> Applying this short principle of law to the facts of the present case, the defendant having entered an unconditional appearance on May 8, 1995 and having filed the statement of defence on May 24, 1995 was thus prevented from filing encl. 11 on June 23, 1995.

That being the case the second defendant was precluded from applying under Order 18 r. 19(1) of the RHC for striking out the plaintiff's claim. Enclosure 64 must therefore die a natural death in the face of the salutary rule enunciated by the Supreme Court in *Alor Janggus's* case. The appeal in Enclosure 80 should be dismissed with costs and the decision of the SAR was accordingly upheld. For my part, I look forward to the trial of this action.

The learned judge in *N Carrupaiya v. MBf Properties* declined to follow the decision in *Alor Janggus*.

In the case of *Alor Janggus*, the plaintiffs held about 43.75% shares in the first defendant. The second defendant was the managing director of the first defendant holding 25.6% of its shares. The second defendant was authorised to act as representative of the first defendant at all meetings of MGR Timber Marketing Sdn Bhd (MGR) in which the first defendant originally had 682,500 shares. On 29 July 1992 at a directors' meeting which was attended by all the directors, it was resolved that an extraordinary general meeting (EGM) be held to consider the disposal of the first defendant's shares in various companies, including MGR. The EGM was convened on 23 August 1992 and all shareholders attended. The second defendant attended as proxy for his company LCTH and some of the plaintiffs attended as proxies for some of the other plaintiffs. A resolution was passed approving the disposal of the first defendant's shares in the said companies. The suit, which was the subject matter of the appeal relates to the disposal of the MGR shares. The second defendant was authorised to execute the relevant sale and purchase agreements on behalf of the first defendant for the sale of the shares to the third defendant and NKK. The sale and purchase agreement was prepared and signed by the third defendant and the second defendant on 1 September 1992. On 1 April 1993, the plaintiffs commenced action in contract for breach of the term of the sale and purchase agreement, and in tort based on an allegation of fraud and conspiracy between the second and the third defendants. The plaintiffs claimed that the sale and purchase agreement was null and void, and that it was a device to defraud all shareholders of the first defendant, as the second defendant had insider information that MGR would be publicly listed in the second board of the KLSE. The plaintiffs claimed that the second defendant had never disclosed that information to shareholders of the first defendant. The plaintiffs contended that, as a result the second defendant had breached his fiduciary duty to the first defendant and the shareholders. It was also contended that the second defendant had breached the resolution dated 23 August 1992. On 2 April 1993, the plaintiffs obtained an *ex parte* interlocutory injunction to prevent the defendants from *inter alia*, disposing or registering the MGR shares or registering the sale and purchase agreement. The second and third defendant applied to dissolve the interlocutory injunction, denying all the plaintiffs' allegation and contending that the plaintiffs' action was vexatious,

scandalous and baseless. As a preliminary objection, the defendants raised the plaintiff's *locus standi* to bring the civil action contending that if the first defendant had suffered a loss the first defendant had to bring the action. The learned trial judge considered the issue of the preliminary objection, accepted the defendants' contention on *locus standi* and dissolved the *ex parte* injunction. On appeal to the Supreme Court, one of the issues raised was whether the High Court had erred in dissolving the injunction on the basis of the *locus standi* point.

Delivering the judgment of the Supreme Court, Mohd Jemuri Serjan CJ said at p. 478:

> It was open to the defendants to resort to Order 18 rule 19 or Order 33 rule 2 of our High Court Rules 1980 but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone this appeal should succeed. It is too late now for the defendants to invoke Order 18 rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18 rule 19 but it is still open to them to have recourse to Order 33 rule 2 if they are so minded.

In my view the decision of the Supreme Court in *Alor Janggus* is clear and unmistakable. The Supreme Court held that the procedure used by the defendants in arguing the *locus standi* point was unorthodox and a blatant departure from the correct procedure. The Supreme Court decided that it was necessary for it to make its observation on this aspect of the case since it would appear that it had never been called for consideration in our courts before. This led to the consideration as to why the defendants did not invoke O. 18 r. 19 or O. 33 r. 2 of the RHC which was open to them to resort to in the first place. The Supreme Court then went on to explain by reference to authorities why invocation of O. 18 r. 19 or O. 33 r. 2 would have been the correct procedure. However the court subsequently held that it was too late for the defendants to invoke O. 18 r. 19 because they had filed their unconditional appearance. I do not think that there is any ambiguity in that part of the decision regarding O. 18 r. 19. If you have filed an unconditional appearance you deprive yourself of the right to invoke O. 18 r. 19.

To my mind the answer to the submission advanced on behalf of the defendant in urging this court not to follow *Alor Janggus,* can be found in the statements made in the judgments in *PP v. Datuk Tan Cheng Swee, Cooperative Central Bank v. Feyen, Cassell & Co Ltd v. Broome* and *Miliangos v. George Frank Textiles* which I have adverted to earlier. Indeed in the light of these authorities, I do not think it is open to me to disregard or refuse to follow

the decision in *Alor Janggus* unless and until it is reversed by the Federal Court. In any case I am of the view that even if what was said by the Supreme Court in *Alor Janggus* on O. 18 r. 19 was merely *obiter* being a judicial pronouncement emanating from the highest court in this country then, it deserves the utmost respect and should be followed as a guide as faithfully as possible. In the result I hold that since the defendant had filed unconditional appearance, it was precluded from filing an application under O. 18 r. 19 of the RHC.

The intervener's preliminary objection is allowed and the defendant's application in encl. 9 is dismissed with costs.